

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219591.2; B-219594.2 **DATE:** August 27, 1985

MATTER OF: F&F Pizano--Request for Reconsideration

DIGEST:

Protest that a bidder and principal on a bid bond may serve as its own surety is without merit as such a situation would defeat the purpose of the bond.

Frank Pizano, Jr., d/b/a F&F Pizano, requests reconsideration of our July 25, 1985, dismissal of its protests, B-219591, B-219594, concerning the Department of Agriculture's invitation for bids Nos. SCS-13-PA-85 and SCS-27-PA-85. The protester's bids were rejected as non-responsive because the penal sum was omitted from the accompanying bid bond. The protester alleged that these omissions were minor informalities and that they should have been waived or that he should have been given an opportunity to cure the defects. We dismissed the protest because a bid accompanied by a bid bond containing no penal sum is nonresponsive, since no obligation in a sum certain is undertaken by the surety. We affirm our dismissal.

The protester, noting that our prior decision cited Allen County Builders Supply, B-216647, May 7, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ 507, asserts that a different result is warranted here because in Allen County corporate sureties were involved while here we have "the unique situation where the surety and bidder are one and the same."^{1/} We think this situation, rather than permitting acceptance of the bids, provides a further basis for rejecting them.

^{1/}The bidder is an unincorporated firm or sole proprietorship.

Suretyship is a tripartite relationship created by agreement between the party insured (the government), the principal obligor (the bidder), and the surety or guarantor (a third party). Federal Acquisition Regulation, 48 C.F.R § 28.001 (1984). A surety necessarily must be distinct from the principal, as the surety undertakes to pay the debt or to perform an act for which the principal has bound himself, should the principal default. 74 Am. Jur. 2d Suretyship § 3(1974). Thus, a bidder, who is the principal on the bid bond cannot be his own surety. See also Standard Form 28, Instruction 2 (covering the unacceptability of partners as a surety where the partnership or an individual partner is the principal obligor on the bond).

The determinative question as to the acceptability of such a bond is whether the bidding documents establish that the bond could be enforced if the bidder does not execute the contract. Minority Enterprises, Inc., B-216667, Jan. 18, 1985, 85-1 CPD ¶ 57. As the creditor, the government's right to maintain an action against the principal exists independently of its rights against the surety. 72 C.J.S. Principal and Surety § 245 (1951). Therefore, the fundamental purpose of the bid bond is frustrated where the bidder/principal is the same person as the surety.

Thus, aside from the original defect--the failure to include a penal sum in the bond--the bond is defective because the surety in this instance cannot be considered to be acceptable.

The prior decision is affirmed.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel